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“CANADA’S NATIONAL STATUS”: A REPLY

BY JOHN S. EWART

ALLEGING that with reference to Canada’s national status “ignorant misinterpretations are abroad which need to be challenged”, Professor Kennedy contributed recently to *THE NORTH AMERICAN REVIEW* an article with a view to making “clear to foreign nations, especially to the United States”, what that status is. The task is difficult. The relation between the United Kingdom and Canada is anomalous and fluid. No known political term or phrase can describe it. The legalities are sharply contradicted by the acknowledged conventions. That Canada has no power to do this or that may be admitted, but that she does it must be added. Under these circumstances, definition is impossible, and all that can be done is (1) to relate accurately the facts bearing upon Canada’s status, and (2) to note their tendency. In both of these respects, there are points in Professor Kennedy’s article which “need to be challenged”.

The chief of these, and that which is of principal interest in the United States, relates to the treaty power. Upon that subject the Professor (referring to Lord Ripon’s dispatch) says:

Finally regulations were drawn up in 1895 which hold the field substantially to the present time. Any treaty must be made between the Imperial Government, not the Dominion of Canada, and the foreign State concerned. Since final responsibility must remain with Great Britain, independent powers of negotiation could not be granted to Canada. Negotiations must be conducted by the British representative aided by Canadian representatives as second plenipotentiaries or as subordinates. Any treaty which might be concluded would be signed by the plenipotentiaries only after its terms had been approved by the Imperial and Canadian Governments. It would ultimately be ratified by the Crown acting on the advice of the British Cabinet, if the Canadian Government so desired; or, in the event of legislation being requisite to make its terms effective, if the Canadian Parliament so desired. Conditions of negotiation were laid down: concessions made to any foreign Power must be

made to any other foreign Power having by existing treaties most-favored-nation rights in Canada; any concessions so made must be extended without compensation to all British possessions; no concessions must be accepted from a foreign Government which would be prejudicial to other parts of the Empire.

To say that all this holds "the field substantially to the present time" is to ignore everything that has subsequently happened. Twelve years after the Ripon dispatch.¹ Sir Edward Grey when referring to the Franco-Canadian negotiations at Paris said:

I do not, however, think it necessary to adhere in the present case to the strict letter of this regulation, the object of which was to secure that negotiation should not be entered into, and carried through, by a colony unknown to and independently of His Majesty's Government. The selection of the negotiator is principally a matter of convenience, and in the present instance it will obviously be left to Sir Wilfrid Laurier and to the Canadian Minister of Finance, who will doubtless keep you informed of their progress.

Upon this occasion, two Canadian ministers carried on the negotiations, quite independently of the British Foreign Office, and after agreement had been reached, one of them wrote to the Foreign Secretary saying that the treaty was nearly ready and asking that arrangements might be made for its signature without delay. This marked advance upon 1895 was acclaimed in the United Kingdom as well as in Canada.

Following up that precedent, and acting quite independently, Canada has carried on a series of negotiations with foreign countries—with France, Germany, Italy, Spain, and, principally, with the United States. Under a treaty with the United States (1910) a permanent International Joint Commission, composed of three Americans and three Canadians (appointed by Canada), has dealt with and successfully settled a large number of questions between the two countries, and made no report of its proceedings to the Foreign Office. Canada has moved a long way from the Ripon notions, and not the least attention is paid to his "conditions of negotiation" to which the Professor refers. Canada makes such treaty arrangements as please her.

¹ Only three years after the Ripon dispatch (1898) a High Joint Commission was appointed for the settlement of questions with the United States upon which there were four Canadians and only one British representative. Ripon was out of office and his ideas already out of date.

With reference to “strictly political treaties”, Professor Kennedy declares:

there has been no fundamental advance in this period, as international responsibility must lie with Great Britain.

But he overlooks not only the secular work of the International Joint Commission, but the fact that in political treaties, as in commercial treaties, there has of late years been inserted a clause providing that Canada is not bound by them unless she assents to them. The Professor refers to such a provision in commercial treaties as a “development”. He is undoubtedly right, and it is true also of political treaties, for it gives to Canada a negative control of her relations with foreign Powers. The Anglo-Japanese treaties of 1894 and 1911, for example, contained the reservation of Canada’s option, and the negotiations with Japan for Canadian adhesion to the treaties were carried on, partly by a Canadian minister at Tokio and partly at Ottawa, without any interference from London. Of greater significance is the fact that the treaty between the United Kingdom and France of 28 June 1919, providing for war-assistance to France as against Germany, contained the following clause:

The present treaty shall impose no obligation upon any of the Dominions of the British Empire unless and until it is approved by the parliament of the Dominion concerned.

It is noteworthy that this provision contemplates the possibility of Canada abstaining from participation in a war in which the United Kingdom would be engaged. And of still greater significance, from one point of view, is the fact that the treaty of Versailles and the other peace treaties were not deemed to be complete until ratified by the parliaments of the Dominions.

Referring to “foreign affairs”, the Professor says:

In spite of all the phrases which have passed into currency, Canada has no international status. . . . Canada cannot negotiate directly with a foreign country in the political or any other important sphere. If negotiations are necessary, or called for, or Canada is vitally interested, the Crown will act on Ministerial advice with the consent of the Canadian Government.

Mr. Kennedy did not forget the arrangement for the appointment of a Canadian Minister Plenipotentiary at Washington, but he

throws it aside, saying that "the diplomatic unity of the Empire has been expressly preserved". When announcing the terms of the arrangement, Mr. Bonar Law said (in part):

Accordingly it has been agreed that his Majesty, on the advice of his Canadian Ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs, and will be at all times the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from and reporting direct to the Canadian Government. In the absence of the Ambassador, the Canadian Minister will take charge of the whole Embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by his Majesty to the President with the necessary powers for the purpose. This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.

The obvious deduction from this is that "the principle of the diplomatic unity of the British Empire" has sustained something of a shock by the institution of a practice disruptive of it.

Not only has Canada, in this respect, acquired one of the elements of international status, but her elevation (her partial or qualified elevation) has been recognized by the Powers signatory of the Versailles Peace Treaty. In this connection, Professor Kennedy says:

Canada is a distinct member of the League of Nations with the right to representation on its council, and again: Canada has a separate status within the Empire, but contingent on its position as a constituent part of the British Empire.

The contingency is nowhere expressed in the Covenant, and various of the clauses are inconsistent with its existence. Note, for example, articles 1, 10, 11, 16, 23. Whether, however, in this respect the Professor's view or mine be correct, is not, for the present, very important. All that is here insisted upon is that the assertions that "Canada has no international status", and that Canada cannot negotiate directly with a foreign country in the political or any other important sphere

require qualification (1) because of her right to appoint a Minister Plenipotentiary at Washington who

will be at all times the channel of communication with the United States Government in matters of purely Canadian concern;

(2) because of her position as a member of the League of Nations; and (3) because of the relations of other of the Dominions to the League of Nations as Mandatories making reports to the League. Italy’s invitation to attend the recent Genoa Conference came direct to Canada.

The Professor is undoubtedly right when he declares that “as the law of nations now stands Canada is not a sovereign state”, but if so, why does he speak of the period subsequent to 1914 as—the period of national manhood suddenly matured by the most tragic events of history;

and why, without warning of its inaccuracy, does he tell us, when referring to the effect of the war, that—

The Prime Minister of Canada emphasized the situation. The English Premier was only *primus inter pares*, and Canada was Great Britain’s constitutional equal, preserving its full autonomy and its complete self-government, carrying on diplomatic correspondence no longer through the Colonial Office but directly with the Prime Minister of Great Britain?

I am not aware that Sir Robert Borden has said that “Canada was Great Britain’s constitutional equal”, but if he did, he was clearly wrong, for the United Kingdom is a sovereign state and Canada is not. That Sir Robert made the statement as to correspondence is almost certainly not correct. All that has happened in that respect is that the Premiers agreed that (as appears in the official announcement)—

It has therefore been decided that for the future the Prime Ministers of the Dominions, as members of the Imperial War Cabinet, shall have the right to communicate on matters of Cabinet importance direct with the Prime Minister of the United Kingdom, whenever they see fit to do so.

Save for the infrequent interchange of communications between the Premiers “on matters of Cabinet importance”, the correspondence continues as before.

Although the Professor declares that “it is necessary to walk carefully” when dealing with “consultations” during the war, he disregards his warning. Had he been writing for British or Canadians only, he might possibly plead common carelessness of expression for saying that—

Canadian Ministers became members of the Imperial War Cabinet created by Mr. Lloyd George,

Lord Milner having regretfully recanted his use of the misleading phrase "Imperial War Cabinet", saying "I see I am in a minority" (*The Times*, 20 July 1921), there is little excuse for continuing it. And there is none at all for the statement that the decisions of the Prime Ministers—

remained mere decisions until concurred in by the Imperial and Dominion Cabinets.

The meetings were (as the report for 1917 declares)—

for deliberation about the conduct of the war, and for the discussion of the larger issues of imperial policy connected with the war (p. 7).

For translation into operation, the decisions could not, and did not await the concurrence of the five widely separated cabinets.

Mr. Kennedy's ideas as to the only method by which Canada could separate herself from the United Kingdom are original, but of doubtful validity. It would necessitate, he thinks, (1) a British statute, and (2) "agreement on the part of the other constituent members of the Empire". The Professor forgets that when the thirteen American colonies separated from the British Crown there was no British statute. If Canada chose to declare her independence,¹ the British Government could either endeavor, by military effort, to subdue her (he rightly agrees that that would not be attempted), or recognize the indisputable right of such a community as Canada to be independent if it so desired. Concurrence on the part of the British Parliament would be acceptable, but quite unnecessary. In support of the astonishing assertion that common action of the British and Canadian Parliaments would be ineffective without the assent of Australia, New Zealand, etc., the Professor refers to the League of Nations, which, he declares binds every member of the Empire to preserve its territorial integrity. Article X does indeed provide that members of the League are—

to respect and preserve as against external aggression the territorial integrity . . . of all members of the League,

but when the Professor says that—

the Covenant binds Canada with other members of the Empire to preserve the territorial integrity of the Empire,

¹ The Professor declares that Canada could not enact separate legislation because the Crown could not assent. The Thirteen Colonies were in the same case. But nobody thought that legislation was necessary.

he overlooks the qualifying words “as against external aggression”. The clause has no application to internal disruption.

Referring to Canada’s political future, the Professor denies that—

the logic of the situation leaves Canada with the alternative of complete independence or permanent inferiority of status.

We may agree with what he says about the division of sovereign powers (while retaining our view as to the impartibility of sovereignty), but it is difficult to follow him when, from that, he argues that—

We need not therefore despair of the unity of the British Empire because Canada and its other constituents, as they attain political manhood, claim a political sovereignty of their own. . . .

Why then, we may well ask, should not the British Empire remain a unity although the aspirations of its parts for autonomy find the complete expression they may desire?

The reason, of course, is that although in theological discussion we bow our ignorant heads before the doctrine of three and yet only one, we confidently assert in other realms that one is one and two are not one. That there can be two communities, each possessed of (complete) political sovereignty, and yet that they can in some way be regarded as parts of a united empire, is an assertion which, for its acceptance, requires much more exposition than the Professor supplies. It cannot be sufficient to declare that—

the final unity of any State is to be sought not within the form of government at all but in the consensus of political opinion, in the communal will which sets up and pulls down the instruments of political power.

Sovereignty certainly may be sought in that direction, but “consensus of political opinion” has no relation to political unity. Political unity frequently exists, and for many years continues, in spite of discord in “the communal will”, and there may be consensus of political opinion in two states between which there is not a trace of political ligament. No word-juggling will ever make a political unit out of two (completely) sovereign states. It would be interesting if the Professor, besides asserting the contrary, would indicate what in that case would be the relations between the several parts of the one, and between the parts

and the whole. If each state is to be sovereign, and therefore independent of the other; if there is to be neither superiority nor inferiority; if in reality there are two unrelated States, in what can their political unity consist? If the question is curious, it must be charged to the existence of incongruity between the Professor's view of political unity and customary mathematical prejudices. And I add a further question: If "complete independence" and "permanent inferiority of status" are not the only alternatives, what is the other? There is none. For remove inferiority, establish equality, and the result *is* independence. In other words, Canada's equality of status with the United Kingdom *is* Canadian independence. If Sir Robert Borden has said that "Canada was Great Britain's constitutional equal", very many Canadians would be glad if he could make good the assertion.

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